IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.06.2007

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MR.JUSTICE P.P.S.JANARTHANA RAJA

T.C.(A) Nos.700 to 704 of 2007

Commissioner of Income Tax
Madurai. .. Appellant in
all T.Cs/Appellant

Vs.

M/s.Southern Roadways Ltd.,
Usilampatti Road,
Kochadai, Madurai .. Respondent in
all T.Cs/Respondent

Appeals under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'D' Bench dated 30.8.2005 in ITA Nos.793 to 795 and 1075/Mds/2002 and 536/Mds/2000, for the assessment years 1995-96 to 1997-98 against the order of the Commissioner of Income Tax (Appeals) IX Chennai for the Assessment year dated 1993-94 1994-95 1994-95, 1995-96 1996-97 1997-98 dated 17.1.2000, 6.9.2000 and 14.3.2002 in ITA No. 395/95-96 276/96-97 226/97-98, 67/98-99 553/99-2000 and 159/2000-01 and against the assessment order of the Deputy Commissioner of Income Tax (Special Range I) Madurai and Joint Commissioner of Income Tax Special Range I, Madurai, dated 5.3.98, 19.3.99 & 29.3.2000 in PAN GIR.No.47-016-CX-4060, respectively.

For Appellant : Mr.J.Narayanasamy, Jr.SC for IT

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J U D G M E N T
(Delivered by P.D.DINAKARAN, J.)

The above tax case appeals are directed against the common order of the Income-tax Appellate Tribunal dated 30.8.2005 made in ITA Nos.793 to 795 and 1075/Mds/2002 and 536/Mds/2000 for the assessment years 1995-96 to 1997-98.

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2. The Revenue is the appellant. For the assessment years 1995-96 to 1997-98, the Assessing Officer disallowed the assessee's claim of expenditure incurred on software packages as revenue expenditure and for the assessment years 1995-96 and 1996-97, he disallowed the claim of expenditure incurred on construction of new compound wall removing the existing barbed wires as revenue expenditure. For the assessment year 1995-96, the Assessing Officer disallowed the claim of expenditure on replacement of UPS and for the assessment year 1996-97, he disallowed the claim of expenditure incurred on replacement of printer and treated the said expenditure as capital expenditure. Aggrieved by the same, the assessee preferred appeals before the Commissioner of income-tax (Appeals), who, partly allowed the appeals. Against the order of the Commissioner, both the assessee and the Revenue preferred appeals before the Income-tax Appellate Tribunal, which, by common order dated 30.8.2005, held all the issues in favour of the assessee holding the expenditure incurred on software packages, on construction of compound wall, on replacement of UPS and on replacement of printer as revenue expenditure. Hence, the present tax case appeals by the Revenue raising the following substantial questions of law:-

> "1. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the expenditure incurred on the software package is a revenue expenditure ?
>
> 2. Whether in the facts and circumstances of the case, the Tribunal was right in holding that expenditure incurred on construction of compound wall in the place of barbed wire fencing is a revenue expenditure ?
>
> 3. Whether in the facts and circumstances of the case, the Tribunal was right that the expenditure incurred on replacement on UPS system is a revenue expenditure ?
>
> 4. Whether in the facts and circumstances of the case, the Tribunal was right that the expenditure incurred on replacement of printer is a revenue expenditure ?"

3.1. The balancing point to answer these substantial questions of law lies on the celebrated test, as laid down by Lord Cave L.C. in Atherton v. British Insulated and Helsby Cables Ltd. [(1925) 10 TC 155, 192 (HL)], whereunder the learned Law Lord stated as follows:-

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" .. when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

(emphasis supplied)

3.2. This test, as a parenthetical clause, must yield where there are special circumstances leading to a contrary conclusion and, as pointed out by Lord Radcliffe in Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd. [(1965) 58 I.T.R. 241 (PC)], it would be misleading to suppose that in all cases, securing a benefit for the business would be prima facie, capital expenditure 'so long as the benefit is not so transitory as to have no endurance at all'.

3.3. Based on the above views expressed by Lord Cave L.C. in the Artherton's case, and by Lord Radcliffe in the case of Nchanga Consolidated Copper Mines Ltd., referred supra, the Apex Court in Empire Jute Co. Ltd. v. Commissioner of Income-tax [(1980) 124 I.T.R. 1], held that there is no embracing formula which can provide a ready solution to the problem; no touchstone has been devised. Every case has to be decided on its own facts, keeping in mind the broad picture of the whole operation in respect of which the expenditure has been incurred. In the said case, the Apex Court has further held as follows:-

".. There may be cases where expenditure even if incurred for obtaining advantage of enduring benefit, may nonetheless, be on revenue account and the test of enduring benefit may break down. It is no every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. if the advantage consists merely in facilitating the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly andmechanically without regard to the particular facts and circumstances of a given case."

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The Apex Court has further held that there may be cases where expenditure, though referable to or in connection with fixed capital, is nevertheless allowable as revenue expenditure. An illustrative example would be of expenditure incurred in preserving or maintaining capital assets.

3.4. Reiterating its views expressed in the case of Empire Jute Co. Ltd. [(1980) 124 I.T.R. 1], supra, the Apex Court in Commissioner of Income-tax v. Associated Cement Companies Ltd. [(1988) 172 I.T.R. 257], held the expenditure incurred by the assessee-company for supply of water to the Municipality, for providing water pipelines, for supplying electricity, etc. as deductible expenditure.

3.5. That apart, the Apex Court in Alembic Chemical Works Co. Ltd. [(1989) 177 ITR 377], after referring to B.P. Australia Ltd. v. Commissioner of Taxation of the Commonwealth of Australia [1966] AC 224 (PC), held that,

> "What is capital expenditure and what is revenue are not eternal verities but must need be flexible so as to respond to the changing economic realities of business. The expression 'asset or advantage of an enduring nature' was evolved to emphasise the element of a sufficient degree of durability appropriate to the context."

3.6. The Karnataka High Court, in Commissioner of Income-tax v. Mysore Cemenats Ltd. [(1990) 183 I.T.R. 367], following the ratio laid down by the Apex Court in Empire Jute Co. Ltd. v. Commissioner of Income-tax [(1980) 124 I.T.R. 1] and Commissioner of Income-tax v. Associated Cement Companies Ltd. [(1988) 172 I.T.R. 257], cited supra, held that the test of enduring nature applied to the purpose for which a particular expenditure is incurred is not a conclusive test.

3.7. Further, this Court, in Commissioner of Income-tax v. T.V.Sundaram Iyengar and Sons P. Ltd. [(1974) 95 I.T.R. 428], held that the amount advanced by the assessee for construction of houses under a welfare scheme was held to be in the nature of a revenue expenditure. The said view of this Court was also affirmed by the Apex Court in the same case reported in [(1990) 186 I.T.R. 276 (SC)].

3.8. The Bombay High Court in Zenith Steel Pipes Ltd. (No.1) v. Commissioner of Income-tax [(1990) 185 I.T.R. 126], where the assessee had put up a barbed wire fencing at its factory premises in order to stop entry of animals and of

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outsiders, to regulate the entry of employees and to avoid disputes with neighbours, accepting the case of the assessee that such wire fencing would not last for many years and the nature of advantage by safeguarding the asset in the strict sense would merely facilitate the assessee's trading operations and enable the management to conduct its business in a more efficient and profitable manner while leaving the fixed capital untouched, held that the expenditure incurred on putting up of barbed wire fencing was allowable as revenue expenditure.

3.9. That apart, this Court in an unreported decision in T.C.(A) No.1048 of 2006 [between Commissioner of Income-tax v. M/s.Loyal Super Fabrics], where the assessee claimed the expenditure incurred while shifting his factory premises from Kovilpatti to Cuddalore, as revenue expenditure, which was disallowed by the Revenue, by judgment dated 21.8.2006, applying the law laid down by the House of Lords in Atherton v. British Insulated and Helsby Cables Ltd. [(1925) 10 TC 155, 192 (HL)], referred supra, observed as follows:-

> "... the expression 'enduring advantage' availed by the respondent/assessee by shifting the factory from Kovilpatti to Cuddalore, is a relative term with reference to the survival of the factory in the existing premises. Only if and when the survival in the existing place, but for the shifting, is satisfied, the test of enduring advantage could be applied. If the very survival of the assessee factory in the existing place itself is at stake, the question of applying the test of enduring benefit does not arise, because capital expenditure and revenue expenditure, being not eternal verities - a true principle or belief especially one of fundamental importance, must need be flexible so as to respond to the changing economic realities of the business as well as the survival of the business itself. Therefore, the test of enduring benefit is not a certain and conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case, as sharply observed in the Artherton's case (cited supra)."

4. The proposition that there cannot be any single rigid formula to find out whether a particular expenditure is revenue in nature or capital and that the expenditure was incurred to obtain a benefit of an enduring nature is not the sole test in every case is, therefore, strongly supported by the views expressed by the House of Lords in Atherton v. British

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Insulated and Helsby Cables Ltd. [(1925) 10 TC 155, 192 (HL)], by the Privy Council in Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd. [(1965) 58 I.T.R. 241 (PC)], by the Apex Court in Empire Jute Co. Ltd. v. Commissioner of Income-tax [(1980) 124 I.T.R. 1], as well as by the decision of several other High Courts, referred to earlier. With this background, we propose to answer the substantial questions of law raised by the Revenue in the above appeals.

Question No.1 :

" Whether in the facts and circumstances of the case, the Tribunal was right in holding that the expenditure incurred on the software package is a revenue expenditure ? "

5.1. For the assessment year 1995-96 to 1997-98, the assessee claimed the expenditure incurred on software packages as revenue expenditure, but the same was disallowed by the revenue. The concept of enduring benefit must respond to the changing economic realities of the business. The expenses incurred by installation of software packages in the present computer world, which revolves on the modern communication technology, enables the assessee to carry on its business operations effectively, efficiently, smoothly and profitably. However, such software itself does not work on a stand alone basis. It has to be fitted to a computer system to work. Such software enhances the efficiency of the operation. It is an aid in the manufacturing process rather than the tool itself. Therefore, the payment for such application software, though there is an enduring benefit, does not result in acquisition of any capital asset and it merely enhances the productivity or efficiency and hence, has to be treated as revenue expenditure.

5.2. In view of the above, we hold that the Tribunal had rightly held the expenditure incurred on software packages as a revenue expenditure.

Question No.2 :

" Whether in the facts and circumstances of the case, the Tribunal was right in holding that expenditure incurred on construction of compound wall in the place of barbed wire fencing is a revenue expenditure ?"

6.1. This issue relates to the assessment years 1995-96 and 1996-97, during which the claim of the assessee with respect to the expenditure incurred on construction of compound wall in the place of barbed wire fencing as revenue expenditure was disallowed by the Revenue.

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6.2. While chalking out the balancing point for deciding the substantial questions of law raised by the Revenue based on the ratio laid down by the House of Lords, Privy Council, the Apex Court as well as by other High Courts, referred supra, we have already observed that there cannot be any single rigid formula to find out whether a particular expenditure is revenue in nature or capital and that the expenditure was incurred to obtain a benefit of an enduring nature is not the sole test in every case. Incidentally, we have also referred to the decision of the Bombay High Court in Zenith Steel Pipes Ltd. (No.1) v. Commissioner of Income-tax [(1990) 185 I.T.R. 126], wherein it has been held that putting up of a barbed wire fence was a revenue expenditure.

6.3. When an identical question whether the expenses incurred for replacing the old barbed wire fence around the compound by a compound wall is a revenue expenditure or capital expenditure came up for consideration before the Karnataka High Court in Commissioner of Income-tax v. B.V.Ramachandrappa and Sons [(1991) 191 I.T.R. 34], applying the well settled principles laid down by the House of Lords, Privy Council, Apex Court as well as by the decision of several other High Courts, referred supra, the Karnataka High Court held as follows:-

> " . The purpose of the fence around the business premises was to prevent trespassers and thieves from entering into the business premises; the dominant purpose was to safeguard the property in the premises. The materials in the premises were part of the business assets of the assessee. In this context, the compound wall could not be treated in isolation. It was part of the business premises and when only a part of the premises was replaced, prima facie, it would be a case of repair. The identity of the entire asset as a whole was not affected at all. The works carried out contributed to the better and safer utilisation of the existing business premises asset. The works effected, when considered in proportion to the entire business premises, did not result in significant replacement so as to alter the character of the business premises. Therefore, the Tribunal was right in holding that the expenditure incurred on replacement of thatched roof with asbestos sheets and barbed wire fence with compound wall was revenue expenditure."

6.4. Of course, our attention was brought to another decision of the Karnataka High Court in Senapathy Synamps Insulations (P) Ltd. v. Commissioner of Income-tax [(2001) 248

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I.T.R. 656], where the assessee replaced the existing compound wall with a new foundation and claimed the expenditure incurred on the construction of the wall as revenue expenditure. In the said case, the Karnataka High Court held that the Revenue had rightly treated the expenditure as capital expenditure because the compound wall had been built to provide enduring safety to the assessee. But, we find that the ratio laid down by the House of Lords, Privy Council, Apex Court as well as by other High Courts, referred supra, were not brought for consideration by the Karnataka High Court while deciding the question raised in the said case.

6.5. Therefore, since the decision of the Karnataka High Court in Commissioner of Income-tax v. B.V.Ramachandrappa and Sons [(1991) 191 I.T.R. 34], is fully supported by the ratio laid down by the House of Lords, Privy Council, Apex Court as well as by other High Courts, referred supra, in our considered opinion, in the case on hand, the Tribunal has rightly held that the expenditure incurred on the construction of the compound wall in the place of barbed wire fencing is a revenue expenditure.

Question Nos.3 and 4 :

" Whether in the facts and circumstances of the case, the Tribunal was right that the expenditure incurred on replacement on UPS system is a revenue expenditure ?"

" Whether in the facts and circumstances of the case, the Tribunal was right that the expenditure incurred on replacement of printer is a revenue expenditure ?"

7.1. The reasons that weighed this Court in deciding the issue whether the expenditure incurred for replacement of software packages as revenue expenditure as discussed in question No.1 above, are applicable in all fours to questions 3 and 4 also.

7.2. That apart, this Court in Commissioner of Income-tax v. Southern Roadways Ltd. [(2006) 282 ITR 379], applying the ratio laid by the Apex Court in the case of Alembic Chemical Works [(1989) 177 ITR 377], cited supra, held that upgradation of computers by changing certain parts, thereby enhancing the configuration of the computers for improving their efficiency, but, without making any structural alterations is not of an enduring nature and hence, the expenditure incurred by the assessee has to be treated as revenue expenditure. The said view was again followed by this Court in Commissioner of Income-tax v. Southern Roadways Ltd. [(2007) 288 ITR 15].

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7.3. In view of the above settled proposition, we hold that the Tribunal has rightly held the expenditure incurred on replacement of UPS and printer as a revenue expenditure.

For the foregoing reasons, we find no question of law much less substantial question of law that arises for our consideration in these appeals. Accordingly, the tax case appeals stand dismissed. Consequently, M.P.Nos.1 of 2007 in T.C.(A) Nos.701 to 704 of 2007 are also dismissed.

sra

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1.The Assistant Registrar,
Income Tax Appellate Tribunal
Madras Bench "C".

2.The Secretary, Central Board
of Direct Taxes, New Delhi.

3.The Commissioner of Income-
Tax (Appeals) I, Madurai.

4.The Deputy Commissioner
of Income-tax, Company Circle-1,
Madurai-2.

5. The Joint Commissioner of Income Tax Special Range I, Madurai.

+ 1 cc to Mrs. Pushya Sitaraman, Advocate SR No. 36065

NSM(CO)
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